SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 136

AIR TRANSPORT ASSOCIATES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

The court below dismissed petitioner's application challenging the legality of certain orders of the Civil Aeronautics Board, but rendered no opinion setting forth the reasons for its action. Respondent and intervenor in their briefs in opposition filed herein set forth certain arguments in support of the action of the court below, which are answered in the following order:

1. It was necessary for the court below to have the entire record of the Board's proceedings before it at the time it dismissed the petition for review. In failing to file it the Civil Aeronautics Board disobeyed the statutory directive to certify and file in that court the record of such proceedings which was relevant to a determination of the questions in issue.

2. The decision of this court in *Chicago and Southern Airlines, Inc.*, v. *Waterman Steamship Corporation*, 333 U. S. 103, does not preclude judicial review of these orders.

3. Objections not urged before the Board can be considered as the futility of objecting was obvious. Hence, reasonable grounds for not objecting existed under Section 1006(c) of the Civil Aeronautics Act.

4. The decision of the court below was contrary to and conflicts with the decision of this court in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327.

A discussion of these four points follows.

1. The first point in respondent's brief and the second point in the brief of intervenor seek to justify the action of the court below in the absence of the record being filed in that court, as required by section 1006(c) of the Civil Aeronautics Act; 49 U.S.C. 646(c).[1] Respondent and the intervenor take the position that the necessity of a record is a matter resting within the discretion of the court concerned, citing *American Power Co.* v. *Securities and Exchange Commission*, 325 U. S. 385, 392-3.

That case is distinguishable factually. There, the Commission, before filing a certified copy of the transcript of the record upon which the order complained of was entered, moved to dismiss upon the ground that petitioner was not a "person or party aggrieved" within the meaning of 15 U.S.C.A., 79x(a),[2] and that objection to the order was

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[1] Sec. 1006(c) of the Civil Aeronautics Act, 49 U.S.C. 646(c) provides:

"A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered."

[2] 15 U.S.C. 79x(a) provides:

"Court review of orders. (a) Any person or party aggrieved by an order issued by the Commission * * * may obtain a review of such

frivolous. The Circuit Court of Appeals in that case denied the Commission's motion to dismiss, and this court affirmed. However, in the instant case, the Board's motion to dismiss was granted. Accordingly, that cause is not controlling here.

This court in reviewing the action of the court below in dismissing the petition for review assumes the correctness of the allegations of the petition for review, (R. 1-29) in determining whether an agency may disobey a statutory directive to certify and file in the court below a transcript of the record and simultaneously move successfully to dismiss a petition challenging the regularity and validity of proceedings, lack of substantial evidence of the requirements and standards established by Congress and violation of the Administrative Procedure Act, which resulted in the issuance of the orders here sought to be reviewed.

2. Respondent and the Intervenor in effect urge that, admitting these allegations, still the court below was without jurisdiction because of the decision of this court in the case of *Chicago and Southern Airlines* v. *Waterman Steamship Corporation,* 333 U. S. 103.

Respondent and Intervenor comment that petitioner did not mention this case in its brief. It was not mentioned because petitioner did not and does not believe it controls the proper disposition of this case. It is readily distinguished factually.

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order in the United States court of appeals * * * by filing in such court * * * a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered."

The instant case differs from that case in the following particulars:

(a) The principle announced by this court in the case of *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327, is not involved in that case, but is involved here. There was no requirement by the Civil Aeronautics Board at the time petitioner filed its application for a certificate of public convenience and necessity (R. 27) that required such application to be filed at any particular time or that required petitioner to file a motion to consolidate. It was not until September 15, 1952, that the Procedural Regulations of the Civil Aeronautics Board required a motion to consolidate to be filed prior to the date of hearing (Amendment No. 3 to Part 302, Civil Aeronautics Board Regulations Serial No. PR 17, adopted August 11, 1952, effective September 15, 1952).[3] In the absence of such a provision in its procedural regulations, it is evident that there was no reason for the Civil Aeronautics Board to exclude and not consider an application which was pending for over two years prior to the issuance of the order in this case. Under the principle established by this court in the *Ashbacker* case, it is clear that petitioner's application should have been considered.

(b) A reading of this court's opinion in the case of *Chicago and Southern Airlines* v. *Waterman Steamship Corporation,* 333 U. S. 103, which involves both overseas and foreign transportation, whereas the instant case involves only "overseas" transportation, indicates that this

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[3] This amendment provides:

"Section 302.12—Consolidations. • • • (b) *Time for filing.* A motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, and shall relate only to a then pending application. • • •"

court based its decision upon the fact that foreign transportation was involved in that case. Particular reference is made to that part of this court's opinion appearing on page 109. However the order sought to be reviewed in the instant case involves only overseas transportation between the United States and Alaska, one of its territories, and therefore no problem is here presented involving the foreign policy of the United States. The "overseas" air transportation between the States and Alaska which is the subject of this proceeding does not involve such international delicacy or other consideration as to preclude court review.

While it is true that Section 801 of the Civil Aeronautics Act, 49 U. S. C. 601, requires applications for certificates of public convenience and necessity to engage in overseas [4] and foreign [5] transportation to be submitted to the President before publication, and their issuance is subject to his approval, nevertheless only words "in respect of any foreign air carrier subject to the approval of the President as provided in Section 801" of the Act are exempt from judicial review. As the orders in the instant case do not relate to foreign air transportation they are not so exempt.

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[4] The transportation in question was between Seattle, Washington, and points in Alaska, and constituted "overseas air transportation"; defined by Sec. 1(21)(b) of the Civil Aeronautics Act (49 U.S.C. 401) as transported between:

> "• • • a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Terrritory or possession of the United States; • • •."

[5] Sec. 1(21)(c) of the Civil Aeronautics Act, 49 U.S.C. 401, defines "foreign air transportation" as transportation between "• • • a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation • • •."

(c) Petitioner challenges the regularity of the proceedings in the instant case as follows: (1) "Prejudicial error" as defined by Section 10(e) of the Administrative Procedure Act, 5 U. S. C. 1009(e), (2) inadequacy of hearing and (3) incompatibility of the orders with the criteria or standards prescribed by Section 401(d) of the Civil Aeronautics Act, 49 U. S. C. 481(d). In the *Waterman* case the proceedings were not so challenged.

(d) To hold that the decision of this court in *Chicago and Southern Airlines, Inc.* v. *Waterman Steamship Corporation, supra,* prevents judical review of the Board's order would be to ignore the following provisions of Section 1006(a) of the Civil Aeronautics Act, 49 U. S. C. 646:

> "*Any order,* affirmative or negative, issued by the Authority under this Act, *except any order in respect of any foreign air carrier* subject to the approval of the President as provided in section 801 of this Act, *shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia* upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." (Italics supplied)

To hold that the court below was without jurisdiction in this case, as uged by respondent and the intervenor would require this court to ignore the above provisions of the statute, or to interpolate into it a provision which it does not contain. This would amount to assuming the function of the legislature, and is beyond the limits of the law which are the boundary of the court's authority. As was said by

this court in *Bates* v. *Brown*, 72 U. S. 710, 718, 5 Wall. 710, 18 L. ed. 535:

> "• • • The intention of the legislature constitutes the law. That intention is manifested alike by what they have said and what they have omitted to say. Their language is our guide to their meaning, and under the circumstances we can recognize none other. We cannot go farther than they have gone. The plaintiff in error asks us, in effect, to interpolate into the statute a provision which it does not contain. Were we to do so, we should assume the function of the legislature and forget that of the court. The limit of the law is the boundary of our authority, and we may not pass it."

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 617, 88 L. Ed. 1488, 64 S. Ct. 1215, 153 A. L. R. 1007.

> "• • • The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." *United States* v. *First National Bank*, 234 U. S. 245, 260, 58 L. Ed. 1298, 34 S. Ct. 846.

3. Objections not urged before the Board may, contrary to the argument announced by respondent and intervenor, be considered by the court because it would have been futile for petitioner to have objected to the Board's order issued at the direction of the President, obviously it would have been a useless gesture and vain procedure for petitioner to attempt to persuade the Board to act contrary to their specific instructions from the President. This is respect-

fully submitted, constituted "reasonable grounds" within the meaning of Sec. 1006(e)[6] of the Civil Aeronautics Act for not urging these objections to the Board.

4. The existence of a situation similar to that presented in the case of *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327, exists in the instant case as the application of petitioner and the airlines that were granted certificates in this proceeding were for authority to serve the same points and were therefore mutually exclusive. Here the Board *waited two years* after petitioner filed its application for a certificate before issuing its final order. The failure of the Board to consolidate petitioner's application and consider it simultaneously with that of the two carriers receiving certificates in this proceeding was a denial of petitioner's right to procedural due process, which would have been avoided if the Board had set petitioner's certificate for hearing, considered petitioner's qualifications and then weighed and compared them with those of the two airlines that were granted a certificate in the order under review.

Petitioner was not required to do more than file its application, was not advised either directly or indirectly that it was necessary to do anything further in order to have the Board consider its pending application, of which the Board was on notice. It was not until September 15, 1952, that the Procedural Regulations of the Civil Aeronautics Board were amended to place the requirement of seeking consolidation of a particular application with another pending application upon the applicant. Effective that date, Section 302.12 of the Civil Aeronautics Board's Procedural

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[6] Sec. 1006(e) of the Civil Aeronautics Act, 49 U.S.C. 646(e), provides: "• • • No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority, *or, if it was not so urged, unless there were reasonable grounds for failure to do so.*" (Italics supplied)

Regulations was amended, placing this responsibility upon an applicant.[7] It was only from and after this regulation was adopted that applicants were required to take further action after filing an application for a certificate in order to get the Board to act on it. In order to properly charge petitioners with this duty it became necessary to so provide by regulation. But this regulation only became effective on September 15, 1952. It did not exist when their case was under consideration by the Board. Hence the responsibility rested with the Board to consider petitioner's application before completing its final action in this case during the two years that passed after petitioner's application was filed and before the Board acted upon these mutually exclusive applications for authority to serve the same points.

It will be observed that this proceeding transpired over the same period that a similar situation existed in the case of *Northwest Airlines* v. *Civil Aeronautics Board*, 194 Fed. (2d) 339, where the action of the Board was reversed due to the fact that (as stated by the court at page 346) it failed "to follow its *usual procedure* of hearing these conflicting applications in a single proceeding or of ruling on them simultaneously." (Italic supplied)

[7] Amendment No. 3 to Part 302 of the Procedural Regulations of the Civil Aeronautics Board, Regulations Serial No. PR-17, effective September 15, 1952, provides:

"Section 302.12—*Consolidations.* (a) The Board, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although the Board may, in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or contemporaneous consideration of a particular application shall rest upon the applicant and the Board will not undertake to search its docket for all applications which might be consolidated or contemporaneously considered."

Conclusion

Notwithstanding the arguments advanced by respondent and the intervenor, it is respectfully submitted that because of the failure of the court below to properly apply the decision of this Court in *Ashbacker Radio Corp.* v. *Federal Communications Commission, supra,* the failure of the court below to properly construe the applicable statutes and the importance of obtaining a decisive ruling by this Court on this important matter, the court should grant the writ as prayed here.

Respectfully submitted,

WARREN E. MILLER,
Attorney for Petitioner.

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